Supreme Court, U.S.
FILED

1146

(1)

09-605 NOV 16 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. ———

In The
Supreme Court of the United States

JOINT ADMINISTRATIVE COMMITTEE OF THE PLUMBING AND PIPEFITTING INDUSTRY IN THE DETROIT AREA; PLUMBERS LOCAL 98 APPRENTICESHIP FUND; PIPEFITTERS LOCAL NO. 636 INSURANCE FUND,
Petitioners,

v.

WASHINGTON GROUP INTERNATIONAL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD S. LEDERMAN
Counsel of Record
SULLIVAN, WARD, ASHER
& PATTON, P.C.
1000 MACCABEES CENTER
25800 NORTHWESTERN HIGHWAY
SOUTHFIELD, MI 48075-1000
(248) 746-0700

Counsel for Petitioners

November 16, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

WHETHER, IN AN ACTION BY ERISA FUNDS FOR FRINGE BENEFIT CONTRIBUTIONS OWING UNDER A COLLECTIVE BARGAINING AGREEMENT, THE SIXTH CIRCUIT ERRONEOUSLY GRANTED DEFERENCE AND BOUND THE FUNDS TO AN INTERPRETATION OF THE AGREEMENT BY THE "COMMITTEE" DESIGNATED BY THE DIRECT PARTIES OF THAT AGREEMENT TO PROVIDE RELEVANT INTERPRETATIONS WITHOUT APPLYING THE FACTORS FOR GRANTING SUCH DEFERENCE AS SET FORTH IN *UNITED STATES v. MEAD CORPORATION*, 533 U.S. 218 (2001).

WHETHER THE SIXTH CIRCUIT'S CORRESPONDING RULING THAT "LIKE KIND" FRINGE BENEFIT CONTRIBUTIONS WERE NOT REQUIRED BY THE NATIONAL COLLECTIVE BARGAINING AGREEMENT IS DIRECTLY CONTRARY TO THE RULING OF THE NINTH CIRCUIT IN *U.A. LOCAL 342 APPRENTICESHIP & TRAINING TRUST v. BABCOCK & WILCOX CONSTRUCTION COMPANY, INC.*, 396 F.3d 1056 (9TH CIR. 2005), WHICH CONSTRUED *DE NOVO* SUBSTANTIALLY IDENTICAL CONTRACTUAL LANGUAGE WITHIN A NATIONAL COLLECTIVE BARGAINING AGREEMENT AS REQUIRING "LIKE KIND" CONTRIBUTIONS.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the lower court whose judgment is the subject of this Petition is as follows:

Plaintiffs-Appellants and Petitioner: Joint Administrative Committee of the Plumbing and Pipefitting Industry in the Detroit Area, Plumbers Local No. 98 Apprenticeship Fund and Pipefitters Local No. 636 Insurance Fund.

Defendant-Appellee and Respondent: Washington Group International, Inc.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

RULE 14.1(b) STATEMENT ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF CASE 2

A. Factual Background 2

B. District Court Proceedings 6

C. Sixth Circuit Proceedings 7

ARGUMENT: REASONS WHY THE PETITION SHOULD BE GRANTED 9

I. THE SIXTH CIRCUIT ERRONEOUSLY GRANTED DEFERENCE TO A CONTRACTUAL INTERPRETATION OF THE GPPMA BY THE GENERAL PRESIDENT'S COMMITTEE WITHOUT WEIGHING THE GOVERNING FACTORS TO ESTABLISH THE APPROPRIATE DEFERENCE, IN VIOLATION OF *UNITED*

STATES v. MEAD CORPORATION, 533 U.S. 218 (2001). 9

II. THE SIXTH CIRCUIT'S OPINION BELOW CONTRADICTS THE NINTH CIRCUIT OPINION IN *UA LOCAL 342 v. BABCOCK & WILCOX CONSTRUCTION COMPANY*, WHICH APPLIED AN ANALOGOUS CBA PROVISION FAVORABLE TO PLAINTIFFS 16

CONCLUSION 20

APPENDIX:

Appendix A: Sixth Circuit Amended Opinion (May 29, 2009) 1a

Appendix B: District Court Order (January 9, 2008) 16a

Appendix C: District Court Judgment (January 9, 2008) 28a

Appendix D: Sixth Circuit Order on rehearing (August 18, 2009) 30a

Appendix E: R. 21, Exhibit D, The Answer to Maintenance Challenges, Art. XII, § 2 ..... 32a

Appendix F: R. 21, Exhibit E, Memorandum of Understanding 34a

Appendix G: R. 21, EXHIBIT F, Memorandum of Understanding 36a

Appendix H: R. 22, Exhibit 3, Exhibit A, Letter of Feb. 22, 1993 . . . . . 38a

Appendix I: R. 22, Exhibit 3, Exhibit B, letter of Mar. 18, 1996 . . . . . 40a

TABLE OF AUTHORITIES

PAGE

CASES

Bakery & Confectionery Union & Industrial International Health Benefits & Pension Funds v. New Bakery Company of Ohio,
133 F.3d 955 (6th Cir. 1998) 10, 11

Central States, Southeast & Southwest Area's Pension Fund v. Gerber Truck Services,
870 F.2d 1148 (7th Cir.1989) 11

Fellner v. Tri-Union Seafoods, LLC,
539 F.3d 237 (3rd Cir. 2008) 13

New York State Teamsters Conference Pension & Retirement Fund v. United Parcel Service, Inc.,
382 F.3d 272 (2nd Cir. 2004) 10

Northwestern Ohio Administrators, Inc. v. Walcher & Fox, Inc.,
270 F.3d 1018 (6th Cir. 2001) 8, 10

Thornton v. Graphic Communications Conference,
566 F.3d 597 (6th Cir. 2009) 12, 13, 14, 15

U.A. Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Construction Company,
396 F.3d 1056 (9th Cir. 2005) ..... *passim*

United States Department of Labor v. North Carolina Growers Association, Inc.,
377 F. 3d 345 (4th Cir. 2004) 13, 15

United States v. Mead Corporation,
533 U.S. 218 (2001) 9, 12, 13, 14, 15

STATUTES

28 U.S.C. §1254(1) 1
28 U.S.C. §1331 2
28 U.S.C. §2101(c) 1
29 U.S.C. §1132 2
29 U.S.C. §1132(e) 2
29 U.S.C. §1145 ..... 2, 8, 9, 10

RULES

Sup. Ct. R. 13.1 1
Sup. Ct. R. 13.3 1
Sup. Ct. R. 14.1(g)(ii) 2

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Sixth Circuit, dated May 29, 2009, is reported at 568 F.3d 626 (Sixth Circuit 2009), and is reproduced at App. 1a-13a.

The written opinion granting Defendant, Washington Group International, Inc.'s Motion for Summary Judgment is not officially reported but is available at 2008 U.S. Dist. LEXIS 1448; it is reproduced at App. 16a-27a.

JURISDICTION

The amended judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on May 29, 2009. The Sixth Circuit denied Petitioner's Petition for Rehearing *En Banc* on August 18, 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and 13.3 because it is being filed within 90 days of the entry of the Sixth Circuit's Order denying the Petition for Rehearing *En Banc*. This court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

For purposes of Supreme Court Rule 14.1(g)(ii), the court of first instance had federal question jurisdiction under 28 U.S.C. §1331 and 29 U.S.C. §1132(e).

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 29 U.S.C. §1145:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF CASE

This is an action for the collection of unpaid fringe benefit contributions under 29 U.S.C. §1132 and §1145.

A. Factual Background

Plaintiff Joint Administrative Committee of the Plumbing and Pipefitting Industry in the Detroit Area (hereinafter, the "JAC") is a committee charged with collecting unpaid fringe benefit contributions owing to various Trust Funds pursuant to the collective bargaining agreement between the Metropolitan Detroit Plumbing & Mechanical Contractors Association, Inc. (hereinafter, the "Association") and the Journeymen Plumbers Local No. 98, Detroit, Michigan of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry

of the United States and Canada ("Plumbers Local No. 98"). One such Trust Fund is the Apprenticeship Fund (also referred to as the "Metropolitan Detroit Plumbing Industry Training Trust Fund").

Plaintiff JAC is also charged with collecting unpaid fringe benefit contributions owing to various Trust Funds pursuant to the collective bargaining agreement between the Association and the Pipefitters, Refrigeration, and Air Conditioning Service Local Union No. 636 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Pipefitters Local 636"). One such Trust Fund is the Pipefitters Local No. 636 Insurance Fund.

Defendant The Washington Group International Inc. is a civil engineering and construction firm and has been a party to the General President's Project Maintenance Agreement ("GPPMA") for twenty years. The GPPMA is a national collective bargaining agreement between the contractor and certain listed International Unions of the AFL-CIO. One of the listed unions is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

The Washington Group performs recurring industrial maintenance work under a contract with the owners of plants in Michigan, under the auspices of the GPPMA. The Washington Group was thus required to pay fringe benefit contributions to its laborers as required by the GPPMA.

Under the GPPMA, The Washington Group is required to make fringe benefit contributions as

dictated under the local collective bargaining agreements governing the specific work performed. The controlling provision is Article XII, para. 2 of the GPPMA:

> Fringe benefits as negotiated in local and/or national agreements shall be paid in addition to wage rates as specified in Schedule "A". Only bona fide fringe benefits which accrue to the direct benefit of the individual craft employee are required. **This includes health & welfare funds, annuity, vacation, apprenticeship, training funds, and pension funds. Construction industry promotion funds are not applicable under terms of this Agreement.**

(emphasis added) (R. 21, Exhibit D, p. 11, App. 33a).

By virtue of this quoted provision, The Washington Group was obligated to pay fringe benefits as dictated by Article VI(D)(5)(a) of the Collective Bargaining Agreement entered into between the Association and the Plumbers Local No. 98.

The Plumbers Local No. 98 CBA originally required signatory employers to make certain contributions to the applicable Industry Promotion Fund. Effective December 1, 2002, this provision of the Plumbers Local No. 98 CBA was modified pursuant to a Memorandum of Understanding to provide the employer the option of making a "like kind" contribution to the specified Training Trust Fund in lieu of a contribution to the Industry Fund:

> **Effective December 1, 2002, any signatory employer not contributing to the Industry Fund shall contribute a like kind amount to the Metropolitan Detroit Plumbing Industry Training Trust Fund, which shall be in addition to the regular training trust fund contribution required by sub-paragraph (2) of this Article.**

(emphasis added) (R. 21, Exhibit E, App. 34a-35a).

The Washington Group was also obligated by Art. XII of the GPPMA, above, to pay fringe benefits as dictated by Article VI, paragraph 49 of the Collective Bargaining Agreement entered into between the Association and the Pipefitters Local 636. This provision states:

> All signatory employers, or employers otherwise bound by this Agreement, shall pay to the Mechanical Contractors Association Industry Promotion Fund, for each hour worked, the applicable contributions specified in the wage and fringe benefit schedule. **In the event an employer fails to pay** the Mechanical Contractors Association Industry Promotion Fund, **a like-kind contribution shall be paid to the Pipefitters Local 636 Insurance Fund which shall be in addition to the regular Insurance Fund contribution required by Article VI, ¶ 52.**

(emphasis added) (R. 21, Exhibit F, App. 36a-37a).

The GPPMA further contains a provision which states that "The Administration and Interpretation of"

the GPPMA "is the sole responsibility and sole prerogative of the General Presidents' Committee on Contract Maintenance at the National Level." ["The General President's Committee"]. On two separate occasions in 1993 and 1996, the General President's Committee determined that signatories to the GPPMA were not compelled by Art. XII, paragraph 2, *supra*, to comply with Local CBA provisions requiring the employer to make "like kind" fringe benefit contributions in place of contributions to Promotion Funds that were otherwise barred by Art. XII paragraph 2 because such a requirement would circumvent the intent of the drafters of the GPPMA (App. 38a-42a).

Defendant Washington Group admits that it has not made contributions to the Metropolitan Detroit Plumbing Industry Training Trust Fund. Defendant Washington Group also admits that it has not made like kind contributions to either the Mechanical Contractors Apprenticeship Fund or the Insurance Fund.

B. <u>District Court Proceedings</u>

As a result of The Washington Group's failure to pay these fringe benefit contributions, Plaintiffs initiated this action in the United States District Court for the Eastern District of Michigan. The parties filed Cross Motions for Summary Judgment. In its Order of January 9, 2008, the District Court granted summary judgment in favor of defendant (App. 16a-27a). The District Court relied upon the last sentence of Art. XII, paragraph 2 of the GPPMA: **"Construction industry promotion funds are not applicable under terms of this Agreement".** The

District Court held that this provision of the GPPMA could not be construed as requiring Defendant to make "like-kind" contributions to the two Plaintiff Funds in lieu of contributions to the Industry Funds even when the Local CBA provides for that required alternative (App. 26a-27a).

C. Sixth Circuit Proceedings

Plaintiffs timely filed their Notice of Appeal from the January 9, 2008 Summary Judgment Order and Judgment. The Sixth Circuit issued its original Opinion on April 1, 2009. The Sixth Circuit affirmed the grant of summary judgment in favor of Defendant by giving deference to the President Committee's interpretation of Article XII, paragraph 2 of the GPPMA – which the Sixth Circuit characterized as "reasonable".

Second, the Sixth Circuit rejected Plaintiffs' argument that the Ninth Circuit's Opinion in *U.A. Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Construction Company*, 396 F.3d 1056 (9th Cir. 2005) served as persuasive authority by construing an analogous provision within a national agreement as requiring the contractor to make the like-kind payments at issue. The Sixth Circuit concluded that it was unclear what role the policy committee played in interpreting the national agreement in *Babcock & Wilcox* or what level of deference its decision warranted, if any at all.

The Sixth Circuit, in its original opinion, finally cited to common law "third party beneficiary" principles to support the deference it gave to the interpretation of the General President's Committee,

concluding that as third party beneficiaries to the GPPMA, Plaintiffs did not have greater enforcement rights than the original promises to that contract.

Plaintiffs filed a Petition for Rehearing and Rehearing *En Banc* from the May 29, 2009 Opinion. Plaintiffs asserted that the Sixth Circuit's Opinion created a conflict of authority with *Northwestern Ohio Administrators, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018 (6th Cir. 2001), which grants an ERISA Fund seeking to enforce a collective bargaining agreement greater rights than those possessed by third party beneficiaries claiming contractual enforcement rights under common law.

Plaintiffs' Petition for Rehearing prompted the Sixth Circuit to issue an amended opinion on May 29, 2009 (App. 1a-15a).

Here, the Sixth Circuit acknowledged that the conflicting interpretations of the GPPMA which were proffered by the parties may have both been reasonable (App. 8a-9a, 12a). At the conclusion of the Amended Opinion, the Sixth Circuit further acknowledged for the first time that the rights of the Plaintiffs to enforce the GPPMA as third party beneficiaries were greater than those rights provided under common law due to the dictates of 29 U.S.C. §1145. The Sixth Circuit acknowledged that in a fringe benefit action of this nature filed by ERISA funds, employers-contractors "may not rely on defenses grounded solely in the subjective 'intent' of the parties not manifested in the plan ..." (App. 11a-12a). However, the Sixth Circuit held that this principle did not apply in this action and did not prohibit it from giving deference to the interpretation of the General

President's Committee (*Id.*) The Sixth Circuit again concluded that it was permitted to grant deference to a "reasonable" interpretation of the contractual provision by the Committee. (*Id.*)

The Sixth Circuit thus affirmed the grant of summary judgment in favor of Defendant.

Subsequently, the Sixth Circuit entered its Order denying Plaintiffs' Petition for Rehearing *En Banc* on August 18, 2009 (App. 30a-31a).

ARGUMENT: REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE SIXTH CIRCUIT ERRONEOUSLY GRANTED DEFERENCE TO A CONTRACTUAL INTEREPRETATION OF THE GPPMA BY THE GENERAL PRESIDENT'S COMMITTEE WITHOUT WEIGHING THE GOVERNING FACTORS TO ESTABLISH THE APPROPRIATE DEFERENCE, IN VIOLATION OF *UNITED STATES v. MEAD CORPORATION*, 533 U.S. 218 (2001).

29 U.S.C. §1145, quoted in full above, obligates employers to make "contributions in accordance with the terms and conditions" of a Collective Bargaining Agreement. This statute has been construed by the Sixth Circuit, as well as other circuits, as permitting multi-employer plans to rely on the literal terms of written commitments within a collective bargaining agreement; likewise, employers-contractors which are parties to a contribution dispute may not rely on defenses grounded solely in the subjective "intent" of

the parties not manifested in the Plan. See, e.g. *Bakery & Confectionery Union & Industrial International Health Benefits & Pension Funds v. New Bakery Company of Ohio*, 133 F.3d 955, 959 (6th Cir. 1998).

It is likewise recognized by the Sixth as well as other circuits that because of their unique status and obligations to plan beneficiaries, ERISA funds enjoy greater rights than do common law third party beneficiaries and are entitled to enforce the plain terms of Collective Bargaining Agreements regardless of the contractual defenses which would bar a claim by an original contracting party [e.g. such as a party's alleged intent which is not manifested in the unambiguous language of the agreement. *Northwestern Ohio Administrators, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1023-1024 (6th Cir. 2001). Accord *Bakery & Confectionery Union*, supra, 133 F.3d at 959 ["because, under §515 [of ERISA], multi-employer plans are entitled to rely on the literal terms of written commitments between the plan, the employer and the union, the actual intent and understanding between the contracting parties are immaterial"], *New York State Teamsters Conference Pension & Retirement Fund v United Parcel Service, Inc.*, 382 F. 3d 272, 280 (2nd Cir. 2004).

Otherwise stated, Courts routinely find that 29 U.S.C. §1145 places an ERISA fund [in an action for delinquent fringe benefit contributions] in a better position than a third party beneficiary enforcing rights under common law; the status of an ERISA fund is more analogous to that of a holder in due course because it is "entitled to enforce the writing without regard to understandings or defenses applicable to the

original parties. *Central States, Southeast & Southwest Area's Pension Fund v. Gerber Truck Services*, 870 F.2d 1148, 1154 (7th Cir. 1989). The Courts of Appeals have been "unanimous" in holding that a contribution suit filed under this statute cannot be thwarted by defenses not apparent from the face of the agreement. *Central States, Southeast & Southwest Area's Pension Fund v. Independent Fruit & Produce Company*, 919 F.2d 1343, 1349 (8th Cir. 1990). Courts recognize only two defenses available to an employer in a collection action of this nature: that the pension contributions are themselves illegal or that the collective bargaining agreement is void. *Id.*

The Sixth Circuit has explained the underlying statutory purpose:

> 'By allowing multi-employer funds to enforce the little terms of an employer's commitment, §515 increases the reliability of their income streams, reduces the cost and delay associated with collection actions, and reduces or eliminates the cost of monitoring the formation of Collective Bargaining Agreements.'

Bakery & Confectionery Union, 133 F.3d at 959, quoting 118 F.3d at 1021-1022.

The Amended Opinion of the Sixth Circuit below held that the conflicting interpretations of the GPPMA which were proffered by the parties may have both been reasonable (App. 8a-9a). The Court of Appeals below further held that the controlling standards cited above did not prohibit the Court from granting deference to the General Presidents Committee's interpretation of Art. XII paragraph 2 of the GPPMA

so long as it was a reasonable interpretation (App. 11a-12a). The Sixth Circuit, however, also concluded that Plaintiffs were bound by the interpretation of the General President's Committee in the same manner as were the immediate parties to the GPPMA because, remarkably, the parties offered reasonable, albeit conflicting interpretations of that provision:

> [I]t may well be the case that the language of the national agreement could be construed to 'support' both sides' positions, which is why the committee's prior interpretations have taken a central place in our decision.

(App. 9a).

In this regard, the deference to the Committee accorded by the Sixth Circuit contradicts the dictates of the United States Supreme Court in *United States v. Mead Corporation*, 533 U.S. 218, 228 (2001), as recently applied by the Sixth Circuit in *Thornton v. Graphic Communications Conference*, 566 F.3d 597 (6th Cir. 2009), regarding factors to be considered by a Court in determining the amount, if any, of deference to be given to an alleged "relevant" interpretation of an outside agency or committee which "lacks the force of law".

In *Thornton*, the Sixth Circuit addressed the amount of deference to be given to interpretative rulings of "less formal agency authorities, lacking the 'force of law' of notice and comment rule making, which may be relevant" to the Court's decision. *Id.*, pp. 615-616. The Sixth Circuit in *Thornton* held that the "weight of deference accorded depends on the agency authority's inherent persuasiveness." Quoting from

and applying the controlling standards set forth by the Supreme Court in *United States v. Mead Corporation*, *supra*, the *Thornton* Court held that the reviewing Court must consider 'the thoroughness evident in [the agency authority's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Id.*, p. 615. Accord: *United States Department of Labor v. North Carolina Growers Association, Inc.* 377 F.3d 345, 354 (4th Cir. 2004) [applying *Mead* standards and declining to grant deference to United States Department of Labor interpretative bulletins which lacked "thoroughness" of notice and comment rulemaking], *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 250 (3rd Cir. 2008) [declining to grant *Mead* deference to FDA letter interpretation].

The *Thornton* Court was asked to give deference to an IRS determination letter regarding an issue of "interpretation" controlling in that action. The Sixth Circuit held that the IRS letter did not "carry any weight under *Mead* for primarily two reasons." *Id.*

First, the *Thornton* Court held that the IRS letter merely provided "a summary conclusion" regarding the issue before it and did "not make any specific findings." *Id.*

Secondly, the *Thornton* Court held that "the absence of a rationale explaining how the agency arrived at [its] conclusion militates against granting deference under *Mead*." *Id.*, pp 615-616. Thus, the Sixth Circuit in *Thornton* concluded that the IRS determination letter lacked the power to persuade the Court to grant deference to the IRS's interpretation of

the statutory definition at issue in that action. *Id.* Consequently, the *Thornton* Court held that it was free to construe the statutory provision at issue "*de novo.*" *Id.*

The *Mead* standards of granting deference, as applied in *Thornton,* control the determination of the amount of deference to be granted to the contractual interpretation of the General Presidents Committee in this action because Plaintiffs were not direct parties to the GPPMA, they are instead "elevated" third party beneficiaries to that CBA and they were not parties to the proceedings before the General President's Committee. They are entitled to de novo review of the CBA and are not subject to the same defenses not apparent from the face of the contract as are the unions who may be direct parties to the CBA

Equally as significant, the Sixth Circuit in the Amended Opinion below looked to authority defining the scope of deference given to an agency interpretation as a possible available standard to apply in defining the scope of deference to be granted to the General President's Committee herein. (App. 7a). Consequently, the focus of the Sixth Circuit's analysis was misplaced; the *Mead* factors should have governed its consideration.

Similar to the agency's interpretation of the IRS letter in *Thornton*, the Committee's purported interpretations of Article XII, ¶ 2 of the GPPMA are conclusory and are unsupported by any reasoning. In fact, it appears that the Committee merely purported to identify the "intent" of the original drafters of the GPPMA [e.g. to bar (in Article XII paragraph 2) "like kind" contributions to funds which otherwise provide

"*bona fide*" fringe benefits to the direct benefit of the individual craft employee. There are no specific indications within the Committee's rulings that it attempted to actually interpret the contractual language itself. (App. 38a-42a).

In this regard, page 5 of the Sixth Circuit's Amended Opinion sets forth the cryptic and unsupported conclusions of the Committee:

> ... In 1993, the committee determined that "any attempt to divert industry fund payments to any other fringe benefit fund would circumvent the intent" of the national agreement. JA 267. And in 1996, it determined that the contractor was "not required to remit additional contributions to [an] Apprenticeship Training Trust Fund or any other fund in lieu of Industry Fund contributions."

(App. 6a).

Indeed, absent supportive reasoning proffered by the Committee or any record whatsoever of the proceedings before the Committee, its ruling was not entitled to be given deference and the deference given by the panel herein was erroneous. *Mead, supra, Thornton, supra, North Carolina Growers, supra.*

Absent such deference, the Sixth Circuit's simultaneous finding that each parties' conflicting interpretations were reasonable compelled the entry of an order vacating the district court's summary judgment order in lieu of entry of an order denying the parties' cross motions for summary judgment. However, for the reasons that follow, Plaintiffs submit

that Art. XII, paragraph 2 of the GPPMA unambiguously compelled the Defendant to make the "like kind" contributions at issue.

II. THE SIXTH CIRCUIT'S OPINION BELOW CONTRADICTS THE NINTH CIRCUIT OPINION IN *UA LOCAL 342 v. BABCOCK & WILCOX CONSTRUCTION COMPANY*, WHICH APPLIED AN ANALOGOUS CBA PROVISION FAVORABLE TO PLAINTIFFS

The Ninth Circuit Court of Appeals decision of *UA Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Construction Co*, 396 F.3d 1056 (9th Cir 2005) construed and applied analogous contractual provisions in a manner consistent with the Plaintiffs' position here, is directly on point to the instant action, and contradicts with the erroneous opinion of the Sixth Circuit in this action.

In *Babcock*, the defendant entered into a National Industry Maintenance Agreement ("NIMA") with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. *Babcock & Wilcox Construction Co.*, 396 F.3d at 1057. The *Babcock* Court stated that whenever local U.A. unions work on projects that fall within the scope of the NIMA, the nonlocal employer is governed by the terms of the local labor agreements to which the unions may also be a party when the NIMA incorporates the local terms. *Id.*

The Ninth Circuit in *Babcock* observed that Article IX, paragraph 34 of the NIMA incorporated required apprenticeship training fund contributions set forth in the local agreements by stating:

> Welfare Funds, Pension Funds, Apprenticeship Training Funds and other monetary funds called for in the Local Union Labor Agreement shall be paid in accordance with the Local Union Labor Agreement...

Babcock & Wilcox Construction Co., 396 F.3d at 1057.

Nevertheless, industry promotion fund contributions in *Babcock* were not mandatory under Article IX, paragraph 36 of the NIMA:

> Industry Advancement or Promotion Funds called for in the Local Union Labor Agreement may be paid at the discretion of the Employer.

Babcock & Wilcox Construction Co., 396 F.3d at 1057-58.

The local agreement, in addition to the mandatory hourly apprenticeship training fund contribution, also required a per hour contribution to specified industry promotion funds. *Id.* Article X of the local agreement in *Babcock* also expressly stated in pertinent part:

> For Contractors not paying Contract Administration *and/or* Joint Labor Management Cooperation [which the parties agreed were discretionary industry promotion funds]...**Apprentice training shall be paid on equivalent hourly amount in lieu of such contributions.**

UA Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Construction Co., No. 01-4327, slip

op. at 3 (N.D. Cal. Dec. 23, 2002) (R. 21, Exhibit J, p. 3).

The Ninth Circuit in *Babcock* agreed with the position of the Apprenticeship Fund and held that the text of the NIMA incorporated the requirement of the local agreement which required employers who did not make the contribution to the industry promotion funds to contribute instead to the apprenticeship fund. 396 F.3d at 1058. The Ninth Circuit stated that when the nonlocal employer exercises its discretion under the terms of the NIMA to not contribute to the industry promotion fund, it then becomes required under the local labor agreement to contribute to the apprenticeship fund. *Id.* Importantly, the Ninth Circuit reasoned that the requirement to pay into the apprenticeship fund in lieu of the industry promotion fund was incorporated into the NIMA by the following language: "Apprenticeship Training Funds...**shall be paid** in accordance with the Local Union Labor Agreement." *Babcock & Wilcox Construction Co.*, 396 F.3d at 1058 (emphasis added).

Like *Babcock*, the Plaintiffs Apprenticeship Fund and the Insurance Fund in this action are third-party beneficiaries with standing to enforce Defendant's obligations in the GPPMA. Like *Babcock*, Defendant Washington Group is a party to the national agreement which requires it to pay fringe benefit contributions as required by the local CBA's. Moreover, like *Babcock*, the national agreement here provides that contractors are not obligated to make contributions to industry funds. **In both cases, the nonlocal contractor was certainly permitted to make contributions to Industry Funds if it chose to do so.**

The controlling point in this regard is that the local CBA's in this case provide that if the employer chooses not to make designated contributions into the applicable industry fund, they must make contributions of like kind amounts to the Plaintiff Funds. Specifically, the Memorandum of Understanding between the Association and the Plumbers Local No. 98 specifies that if an employer chooses not to pay into the industry fund, it "shall contribute a like kind amount" to the Apprenticeship Fund (App. 34a-35a). Moreover, both the CBA between the Association and the Pipefitters Local 636, as amended in the subsequent Memorandum of Understanding both unequivocally state that an employer "shall" contribute a like kind amount to the Insurance Fund should the employer elect to not pay the industry fund (App. 36a-37a). The Ninth Circuit in *Babcock* held that the analogous contractual language in the national CBA and local CBA imposed a clear obligation on the employers bound to the National Agreement to make like kind contributions should the employer opt to not pay into an industry fund. 396 F.3d at 1058. The same result is warranted herein.

Indeed, as did the national CBA in *Babcock*, the GPPMA herein incorporated by reference the fringe benefit contribution-requirements from the governing local agreements. Those requirements in turn compel employers who choose to make no contributions to Industry Funds to instead make contributions in like kind amounts to the Plaintiff-Funds. As did the national agreement in *Babcock*, the GPPMA here accepted only contributions to Industry Funds from the designation of required contributions; it did not except the like kind contributions to the Plaintiff-

Funds which are required by the local CBAs. The Sixth Circuit here nonetheless held that the language of the national agreement in *Babcock & Wilcox, supra*, was distinguishable because--unlike the GPPMA--the agreement in *Babcock* "did not limit the obligation to pay locally negotiated benefits to 'bona fide' fringe benefits or to benefits that would 'accrue to the direct benefit' of employees" (App. 8a-10a).

Contrary to the Sixth Circuit's ruling herein, the fact that the GPPMA requires signatory employers to make only "bona fide" fringe benefit payments which inure directly to the benefit of the worker is an irrelevant factor. **By its plain language, Article XII of the GPPMA does not prohibit enforcement of employer duties arising from local collective bargaining agreements to pay "like kind contributions" of fringe benefits to Funds which directly benefit the worker if the employer chooses not to make contributions to Industry Promotion Funds. The only controlling point is that the "like kind" contribution be made to a specified type of Fund which inures directly to the benefit of the worker. If so, the payment constitutes a "bona fide" fringe benefit contribution which is required by Article XII of the GPPMA. Compare *Babcock*, supra.**

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant their Petition for Certiorari.

Respectfully submitted,

SULLIVAN, WARD,
ASHER & PATTON, P.C.

RONALD S. LEDERMAN (P38199)
Attorney for Petitioners
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075-1000
(248) 746-0700

November 16, 2009

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-1271

[Filed May 29, 2009]

JOINT ADMINISTRATIVE COMMITTEE OF THE PLUMBING AND PIPEFITTING INDUSTRY IN THE DETROIT AREA, PLUMBERS LOCAL NO. 98 APPRENTICESHIP FUND AND PIPEFITTERS LOCAL NO. 636 INSURANCE FUND, *Plaintiffs-Appellants*,	)
v.	)
WASHINGTON GROUP INTERNATIONAL, INC., *Defendant-Appellee*.	)

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 06-14288—Julian A. Cook, Jr., District Judge.

Argued: January 16, 2009

Decided and Filed: May 29, 2009

Before: SUHRHEINRICH, BATCHELDER and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Ronald Scott Lederman, SULLIVAN, WARD, ASHER & PATTON, Southfield, Michigan, for Appellants. Charles C. Jackson, MORGAN, LEWIS & BOCKIUS, Chicago, Illinois, for Appellee. **ON BRIEF:** Ronald Scott Lederman, SULLIVAN, WARD, ASHER & PATTON, Southfield, Michigan, for Appellants. Charles C. Jackson, MORGAN, LEWIS & BOCKIUS, Chicago, Illinois, for Appellee.

AMENDED OPINION

SUTTON, Circuit Judge. When an employer signs a collective bargaining agreement, it assumes certain obligations to its employees. At issue in this case are the scope of obligations that a general contractor assumes in signing a national collective bargaining agreement that incorporates—in part—two local collective bargaining agreements designed to provide fringe benefits to independent contractors working on the general contractor's projects.

I.

The parties. Two of the claimants in this case are benefit plans for union members: the Plumbers Local No. 98 Apprenticeship Fund and the Pipefitters Local No. 636 Insurance Fund. The third claimant is the Joint Administrative Committee of the Plumbing & Pipefitting Industry in the Detroit Area ("the administrator"), which collects unpaid fringe-benefit contributions on behalf of several Detroit-area union benefit plans, including the apprenticeship and insurance funds. On the other side of the case is Washington Group International ("WGI"), a civil-engineering and construction company that handles building projects throughout the country as a general contractor.

The agreements. Over twenty years ago, WGI signed a national collective bargaining agreement with fourteen international trade unions and several other national contractors. The agreement was designed to ensure "relative equity and uniform interpretation and application" among the union signatories by "establish[ing] and administer[ing] [a] Collective Agreement in concert, each with the other, and all with the Contractor." JA 275. The agreement obligated WGI to pay for the fringe benefits—health, pension, vacation and others—of any union members working on a given project, as called for by the local collective bargaining agreements covering these workers, but did not apply to "[c]onstruction industry promotional funds." JA 282. An industry promotion fund is designed to benefit the industry "as a whole," Appellee Br. at 10 n.2; *see NLRB v. Sheet Metal Workers Int'l Ass'n*, 575 F.2d 394, 397 (3d Cir. 1978), and is "primarily concerned with the relationship between

the industry and the public" rather than the relationship between the employed and the employer, *McDonald v. Hamilton Elec., Inc. of Fla.*, 666 F.2d 509, 514 (11th Cir. 1982).

The insurance and apprenticeship funds did not sign the national agreement. But they are signatories to two pertinent local collective bargaining agreements ("CBAs"). As amended in 2006, one of the CBAs purports to require contractors (such as WGI) either to contribute payments to an industry promotion fund or to make a like-kind contribution to the apprenticeship fund. The other one (amended the same year) imposes a similar requirement on behalf of the insurance fund. WGI is not a signatory to either of these local CBAs.

The lawsuit. In September 2006, the two funds and the administrator sued WGI in federal court, alleging that the global agreement required WGI to make "like-kind" fringe-benefit contributions to the funds, as required by the local CBAs, and that WGI had failed to make the payments in violation of § 515 of ERISA, 29 U.S.C. § 1145. WGI responded that, while the national agreement obligated it to pay for "bona fide" fringe benefits required by local CBAs, it did not require the construction company to make contributions to industry promotion funds or like-kind contributions in its stead. The district court granted WGI's motion for summary judgment.

II.

This appeal presents one issue: Must WGI make these like-kind contributions to the two funds? No—for several reasons.

Start with the reality that WGI did not sign the local CBAs. While the local CBAs put signatory contractors to a choice—either make payments to the industry promotion funds or make like-kind contributions to the insurance or apprenticeship funds—that obligation by itself has no bearing on the responsibility of a contractor that did not sign the agreements. If WGI has any liability in this case, it cannot arise from the local CBAs alone. *See Serv., Hosp., Nursing Home & Pub. Employees Union v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 503–04 (6th Cir. 1985).

That takes us to the national agreement, which WGI did sign. It commits WGI to pay "[f]ringe benefits as negotiated in local" CBAs, and it does so even when the local unions are not parties to the national agreement, as is true here. JA 282. Taken by itself, this incorporation of the fringe benefits required by local CBAs would seem to require WGI either to contribute to the industry promotion funds or to make like-kind contributions. But the national agreement also limits this obligation:

> Only bona fide fringe benefits which accrue to the direct benefit of the individual craft employee are required. This includes health & welfare funds, annuity, vacation, apprenticeship, training funds, and pension funds. Construction industry promotional funds are not applicable under terms of this Agreement.

Id. The national agreement thus requires WGI to pay only "bona fide fringe benefits," which are defined to include benefits that "accrue to the direct benefit of the

craft employee," such as "health & welfare funds, annuity, vacation, apprenticeship, training funds, and pension funds." Neither the general nor the specific definitions of fringe benefits include industry promotional funds, and indeed the agreement expressly disclaims any obligation by WGI to contribute to such funds.

Another clause of the national agreement completes the picture. "The Administration and Interpretation of" the national agreement, it says, "is the responsibility and sole prerogative of the General Presidents' Committee on Contract Maintenance at the National level." JA 172. In fulfilling that responsibility, the committee has addressed today's question twice before, and each time it concluded that a local CBA may not require a signatory of the national agreement to make like-kind (*i.e.*, increased) fringe-benefit contributions in place of otherwise-barred contributions to industry promotion funds. In 1993, the committee determined that "any attempt to divert industry fund payments to any other fringe benefit fund would circumvent the intent" of the national agreement. JA 267. And in 1996, it determined that the contractor was "not required to remit additional contributions to [an] Apprenticeship Training Trust Fund or any other fund in lieu of Industry Fund contributions." JA 268. The committee issued these governing interpretations long before the local CBAs in this case came into being in 2001 and long before the local CBAs added the like-kind contribution requirement in 2006. In the final analysis, every signatory to the local CBAs, to say nothing of WGI, had no reason to think that the national agreement would permit this requirement.

The funds and the administrator offer several responses to this line of reasoning. *First*, they note that they did not participate in the 1993 and 1996 decisions by the committee and therefore should not be bound by them. In one sense they are right: Whatever the nature of the proceedings that led to these decisions, the claimants did not participate in them and thus cannot be bound by them in the same sense that they would be bound had they been parties to the disputes. But that does not mean these decisions do not amount to relevant interpretations of these provisions by the committee, and it does not overcome the reality that the national agreement places the committee in charge of resolving ambiguities in the national agreement—giving the committee "the responsibility and sole prerogative" to "[i]nterpret[]" the agreement. JA 172. When WGI signed the national agreement, it did so with the expectation that any ambiguity in its meaning would be resolved by the committee, and the claimants have no cognizable basis for altering that expectation.

Second, even if the national agreement delegates interpretive authority to the committee, the claimants argue that the committee's interpretation is not a defensible one, no matter what level of deference it receives—whether the near-conclusive deference given to arbitration decisions, *see Mich. Family Res., Inc. v. SEIU Local 517M*, 475 F.3d 746, 748, 753–54 (6th Cir. 2007) (en banc), the deference given to gap-filling interpretations by administrative agencies, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984), or some similar quantum of interpretive deference. As the claimants see it, WGI is not being required to make contributions to industry promotion funds, which the national agreement prohibits, but is

being required only to make (increased) contributions to authorized fringe-benefit funds, which the national agreement permits. Yet consistent with the committee's longstanding construction, a reasonable interpreter of the provision could conclude that the claimants' interpretation fails to respect its letter and spirit. As for its letter: The national agreement commits WGI to pay only "bona fide" fringe benefits negotiated by local CBAs. How is a required contribution to a local fringe-benefit fund "bona fide" when its amount turns on the value of a requested contribution—for an industry promotion fund—that WGI has declined to make and that the national agreement expressly authorizes it not to make? It is sensible and reasonable to treat the "bona fide" modifier as requiring only payments sought for the ordinary purpose of promoting worker welfare, not the one-off objective of accounting for a contractor's permissible decision not to contribute to an industry promotion fund. As for its spirit: A required like-amount increase in covered benefits to account for the failure by WGI to make contributions to an industry promotion fund represents an end run around the national agreement. The committee's interpretation of the provision is reasonable and deserving of respect.

Third, while *U.A. Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Construction Co.*, 396 F.3d 1056 (9th Cir. 2005), shares several similarities with this case, it does not alter our analysis. There, too, a national agreement required a general contractor to make contributions to welfare funds negotiated through local CBAs on behalf of various independent contractors at the same time that it excluded industry promotion funds from its scope.

Id. at 1057–58. There, too, the local CBAs purported to require the general contractor to make like-kind contributions to welfare funds if it chose not to contribute to the industry promotion fund. *Id.* There, too, the national agreement authorized a "Policy Committee" to interpret the national agreement. *Id.* at 1058–59. And there, too, the committee had not required the payments in a prior case. *Id.* at 1058. Yet there the Ninth Circuit concluded that the contractor must make the like-kind payments. *Id.* at 1058–59.

The language of the *Babcock & Wilcox* national agreement, for one, does not parallel this agreement in at least one material respect. That agreement did not limit the obligation to pay locally negotiated benefits to "bona fide" fringe benefits or to benefits that would "accrue to the direct benefit" of employees. *Id.* at 1057–58.

For another, it is not clear what role the policy committee played in interpreting the national agreement in *Babcock & Wilcox*—or what level of deference, if any, its decision warranted. The Ninth Circuit concluded only that the national agreement "support[ed]" the claimants' position, *id.* at 1058; it did not conclude that a contrary interpretation was *unreasonable* or *implausible*. Here, by contrast, it may well be the case that the language of the national agreement could be construed to "support" both sides' positions, which is why the committee's prior interpretations have taken a central place in our decision.

As we read *Babcock& Wilcox*, it gave no deference to a prior decision of the "Policy Committee." It noted that the committee's authority stemmed from an

arbitration clause, *id.*, that the claimants had not signed the national agreement, *id.*, and that "an intent to subject third-party beneficiaries to arbitration is not presumed; it must appear from the language of the contract, or the circumstances under which it was executed." *Id.* at 1059 (internal quotation marks omitted). Although the policy committee claimed to have "exclusive authority to administer and interpret" the national agreement, the court responded by noting that this was merely an unelaborated assertion and made no mention of any language in the contract supporting it. *Id.* at 1059 n.2 (internal quotation marks omitted).

Here, however, we have a national agreement that gives the committee broad interpretive authority over the agreement without regard to the settings in which its prior decisions arise. That is why we are deferring to the committee's 1993 and 1996 decisions to the extent they are reasonable, not treating themas binding the claimants in the same sense that a prior arbitration with the same claimants would bind them.

Third-party-beneficiary principles support this conclusion. The claimants in this case did not sign the national agreement; they are third-party beneficiaries of it. A "third party beneficiary's rights are derivative" because "the foundation of any right the third party may have . . . is the contract between the promisor and the promisee." 13 Richard A. Lord, *Williston on Contracts* § 37:23 (4th ed. 1990); *see also Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370–71 (1984) (noting that the rights of a third-party beneficiary are subject to all the defenses that arise out of the contract between promisor and promisee, unless the parties to the contract specify otherwise).

As a derivative claimant, a third-party's right to enforce a contract cannot "rise higher than the rights of the contracting party through whom he claims," 13 *Williston on Contracts* § 37:23 (internal quotation marks omitted), because "[t]he beneficiary cannot accept the benefits and avoid the burdens or limitations of a contract," *Trans-Bay Eng'rs & Builders, Inc. v. Hills*, 551 F.2d 370, 378 (D.C. Cir. 1976). In the absence of language in the national agreement altering these background assumptions, *see Schneider*, 466 U.S. at 370–71, 375, the claimants must accept the bitter with the sweet—the portions of the agreement they like along with those they do not. At the same time that the national agreement gives the claimants a right to demand certain benefits from WGI, it limits the benefits they may demand and creates a body that has authority to interpret the meaning of that limitation. Were we to interpret the "bona fide fringe benefits" clause differently from the committee, even after determining that the committee's interpretation was reasonable, we would be permitting the plaintiffs, as third-party beneficiaries, to recover on a claim that no signatory to the national agreement itself could succeed in bringing. A third-party beneficiary generally does not have *greater* enforcement rights than the original promisees to a contract, and the claimants offer no cognizable basis for ignoring that principle here.

These principles, we acknowledge, are subject to an ERISA-grounded exception. Because the statute obligates employers to "make . . . contributions in accordance with the terms and conditions" of a CBA, 29 U.S.C. § 1145, "multiemployer plans are entitled to rely on the literal terms of written commitments," and parties to a contribution dispute may not rely on

defenses grounded solely in the subjective "intent" of the parties not manifested in the plan, *Bakery & Confectionery Union & Indus. Int'l Health Benefits & Pension Funds v. New Bakery Co. of Ohio*, 133 F.3d 955, 959 (6th Cir. 1998). Invoking this principle, we have held that, notwithstanding subsequent handwritten modifications to a controlling agreement, an ERISA plan may recover under the original terms of the agreement, so long as it had no notice of "an intent to supercede the unambiguous typed provisions." *Nw. Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1025 (6th Cir. 2001).

This principle and these cases do not apply here, however. The claimants have never suggested that they lacked notice of the Policy Committee's construction of the national CBA at the time they drafted the relevant provisions of the local CBAs. And by considering the Policy Committee's reasonable reading of that language, we do not elevate an extrinsic modification over the language of the agreement but merely give effect to the national CBA's plain directive about one of the ways the agreement could be interpreted. We regularly defer to an administrative agency's reasonable reading of a statute it is charged with interpreting, *see, e.g.*, *Alliance for Community Media v. FCC*, 529 F.3d 763, 778–80 (6th Cir. 2008), even though agencies have no authority to *modify* a statute's unambiguous meaning, *see id.* at 777. Because, in embracing the Committee's interpretation, we enforce (rather than modify) the terms of the National CBA—including the clause giving the Policy Committee "the responsibility and sole prerogative" to "[i]nterpret[]" it, JA 172—and because the claimants in any event had notice both of the Committee's authority and of its long-standing

interpretation, *Walcher & Fox* and *New Bakery Co.* have no relevance here.

III.

For these reasons, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-1271

[Filed May 29, 2009]

JOINT ADMINISTRATIVE COMMITTEE OF THE PLUMBING AND PIPEFITTING INDUSTRY IN THE DETROIT AREA, PLUMBERS LOCAL NO. 98 APPRENTICESHIP FUND and PIPEFITTERS LOCAL NO. 636 INSURANCE FUND, Plaintiffs-Appellants,	)
v.	)
WASHINGTON GROUP INTERNATIONAL, INC., Defendant-Appellee.	)

Before: SUHRHEINRICH, BATCHELDER and SUTTON, Circuit Judges.

AMENDED JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case number 06-14288
Honorable Julian Abele Cook, Jr.

[Filed January 9, 2008]

JOINT ADMINISTRATIVE COMMITTEE OF THE PLUMBING AND PIPEFITTING INDUSTRY IN THE DETROIT AREA, PLUMBERS LOCAL NO. 98 APPRENTICESHIP FUND and PIPEFITTERS LOCAL NO. 636 INSURANCE FUND, *Plaintiffs*,	)
v.	)
WASHINGTON GROUP INTERNATIONAL, INC., *Defendant.*	)

ORDER

On May 31, 2007, the Plaintiffs, Joint Administrative Committee of the Plumbing and Pipefitting Industry in the Detroit Area, Plumbers Local No. 98 Apprenticeship Fund ("Joint

Administrative Committee"), and Pipefitters Local No. 636 Insurance Fund, and the Defendant, Washington Group International, filed separate motions with the Court, with each of them seeking to obtain a summary judgment in their favor. Fed.R.Civ.P 56.

I.

The Joint Administrative Committee is an entity which has the responsibility of collecting unpaid fringe benefit contributions that are owed to various trust funds pursuant to collective bargaining agreements between the Metropolitan Detroit Plumbing & Mechanical Contractors Association, Inc., and two unions; namely, (1) the Journeymen Plumbers Local No. 98 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Plumbers Local 98"), and (2) the Pipefitters, Refrigeration, and Air Conditioning Service Local Union No. 636 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Pipefitters Local 636").

The Washington Group International ("WGI"), is a civil engineering and construction firm that specializes in infrastructure, mining, energy, and power. The WGI performs recurring industrial maintenance work under a contract with the owners of plants in Mount Clemens and Troy, Michigan. In addition, the WGI works on these projects under the auspices of the General President's Project Maintenance Agreement ("GPPMA"), to which it has been a signatory for the past twenty years.

The GPPMA is a national collective bargaining agreement between a group of national maintenance and engineering contractors, including the WGI, and fourteen international building trades unions, including the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.[1] This national collective bargaining agreement covers maintenance, repair, renovation and replacement work in plants, industrial facilities, and utility installations. Pertinent language within the GPPMA provides that contractors, such as the WGI, "are not required to become signatory to a local collective bargaining agreement." (GPPMA, Article I, ¶ 1, Plaintiff's Ex. A.) The GPPMA also contains the following provision:

> Fringe benefits as negotiated in local and/or National working agreements shall be paid in addition to wage rates. . . . Only bona fide fringe benefits which accrue to the direct benefit of the individual craft employee are required. This includes health & welfare funds, annuity, vacation, apprenticeship, training funds, and pension funds. Construction industry promotional funds are not applicable under the terms of this Agreement.

(GPPMA, Article XII, ¶ 2, Plaintiffs' Ex. A.)

The collective bargaining agreement between the Metropolitan Detroit Plumbing & Mechanical Contractors Association, Inc. and the Plumbers Local

---

[1] Plumbers Local No. 98 and Pipefitters Local No. 636 are local chapters of this union.

No. 98 provides that employers "shall pay into the Industry Fund the applicable contribution specified in the 'Wage and Benefit Schedule' of this agreement for each hour worked by each of its Employees. . . ." (Article VI (D)(5)(a), Plaintiffs' Ex. A at 15.) This section also states that the Industry Fund is "designed to promote and improve the industry." (Article VI(D)(5)(b), Plaintiffs' Ex. A at 15-16.)

On October 17, 2002, the Metropolitan Detroit Plumbing & Mechanical Contractors Association, Inc. and Plumbers Local No. 98 agreed to modify Article VI(D)(5)(a) of their collective bargaining agreement with a memorandum of understanding by adopting the following language: "Effective December 1, 2002, any signatory employer not contributing to the Industry Fund shall contribute a like amount to the Metropolitan Detroit Plumbing Industry Training Fund. . . . ." (Plaintiffs' Ex. E.)

The collective bargaining agreement between the Metropolitan Detroit Plumbing & Mechanical Contractors Association, Inc. and the Pipefitters Local 636 states, in pertinent part, that:

> Employers agree to contribute the current allocated sum for each hour worked by each Employee . . . to the Plumbing and Mechanical Contractors of Detroit Industry Fund. Effective June 1, 2002, any non Association contractor who . . . elects not to contribute to the Industry Fund shall . . . contribute a like amount to the Pipefitters Local No. 636 Insurance Fund.

(Article VI, ¶ 49, Plaintiffs' Ex. B at 33.) This collective bargaining agreement was subsequently modified by

a memorandum of understanding which effectively revised Article VI, ¶ 49 on March 1, 2006 by stating that those employers who fail to pay into the Industry Fund must make "a like-kind contribution" to the Insurance Fund. (Plaintiffs' Ex. F.)

The record reveals the following facts which are not disputed by any of the litigants in this litigation: The WGI did not make any (1) contributions to the Plumbers Local 98's Industry Fund pursuant to Article VI (D)(5)(a) of the parties' collective bargaining agreement, (2) payments to the Pipefitters Local 636 Industry Fund pursuant to Article VI, ¶ 49 of its collective bargaining agreement, and (3) "like-kind contributions" to the Local 98's Training Fund or the Local 636's Insurance Fund, as described in the memoranda that amended the collective bargaining agreements.

Here, the Plaintiffs have alleged that the WGI is legally obligated to make payments to the Plumber's Training Fund and the Pipefitter's Insurance Fund. According to the Plaintiffs, the WGI is indebted to (1) the Plumber's Training Fund in the amount of $11,354.66, and (2) the Pipefitters Insurance Fund for the sum of $63,119.75.

II.

In 1986, the Supreme Court opined that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupportable claims or defenses . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). At the same time, the language within Federal Rule of Civil Procedure 56(c) indicates that a motion for a summary judgment

should be granted only if a party "show[s] that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Here, the burden is on the movant to demonstrate the absence of a genuine issue of a material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In assessing a summary judgment motion, a Court must examine any pleadings, depositions, answers to interrogatories, admissions, and affidavits in a light that is most favorable to the non-moving party. Fed. R. Civ. P. 56(c); *see United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991); *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984). Thus, it is the responsibility of this Court to determine "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

A dispute is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Hence, a summary judgment must be entered if (1) the submitted evidence in support of the dispositive motion clearly suggests that the contested matter is "so one-sided that [the proponent] must prevail as a matter of law," *id.* at 252, or (2) the opponent fails to present evidence which is "sufficient to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Upon such a showing, the non-moving party must act affirmatively in order to avoid the entry of a summary judgment in favor of the movant. Fed. R. Civ. P. 56(e). On the other hand, the presentation of a

mere scintilla of supporting evidence is insufficient to support the requested relief. *See Anderson*, 477 U.S. at 252, *quoted in Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). Indeed, "[i]f the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249–50 (citations omitted).

III.

In seeking to obtain a summary judgment, the Plaintiffs rely upon Section 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1145, which governs employer contributions to multi-employer fringe benefit plans, such as those plans that are at issue in this case:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. Thus, employers are required to make contributions according to the terms of their collective bargaining contracts. *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F.3d 680, 683 (6th Cir. 2000).

Here, in the collective bargaining contract to which the WGI is a signatory, the GPPMA states that employers "are not required to become signatory to a local collective bargaining agreement." (GPPMA, Article I, ¶ 1, Plaintiff's Ex. A.). However, employers

are required to pay "fringe benefits as negotiated in local and/or National working agreements." (GPPMA, Article XII, ¶ 2, Plaintiffs' Ex. A. at 11.) Finally, contributions to "[c]onstruction industry promotion funds" as a form of a fringe benefit are not required. (*Id.*)

In this case, the Plaintiffs are not seeking to require the WGI to make contributions to the unions' industry funds. (Plaintiffs' Brief at 9.) Rather, they argue that the WGI is obligated to make "like-kind" contributions to the Plumber's Training Fund and the Pipefitter's Insurance Fund in accordance with the memoranda of understanding which amended the collective bargaining agreements. WGI disagrees.

Contributions to the unions' industry funds are not required under the GPPMA. In fact, Article XII, Section 2 of the GPPMA expressly excludes industry promotion funds from those fringe benefit plans that employers are required to pay. Thus, this Court must determine is whether the WGI is required to make the "like-kind" contributions to the Plumber's Training Fund and the Pipefitter's Insurance Fund as argued by the Plaintiffs.

Language in a contract must be given enforcement according to its obvious meaning, and a court is obliged to read the parties' agreement as a whole when attempting to apply the plain language of the contract. *Old Kent Bank v. Sobczak*, 243 Mich. App. 57 (2000). When the language that is used by the parties is clear and unambiguous, an interpretation by the court and its enforcement is limited to the wording within the parties' contractual agreement. *Michigan Mut. Ins. Co. v. Dowell*, 204 Mich. App. 81 (1994). The parties – in

the absence of extenuating and legally prohibitive circumstances – are presumed to understand and intend that which the employed language clearly states. *Burkhardt v. Bailey*, 260 Mich. App. 636 (2004). In addition, "every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument." *McIntosh v. Groomes*, 227 Mich. 215, 218 (1924). Finally, if the language within the contract is clear and unambiguous, then its meaning is a question of law. Similarly, the issue of whether certain language within a contract is ambiguous is also a question of law. However, if language is found to be ambiguous, its meaning becomes a question of fact. *NILAC Intern. Marketing Group v. Ameritech Services*, Inc., 362. F.3d. 354 (6th Cir. 2004).

When determining whether a contract is ambiguous as a matter of law, courts may consider the extrinsic evidence that has been offered in support of each party's interpretation of the contested language. *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 684 n. 12 (6th Cir 2000) ("Extrinsic evidence can become a consideration before an ambiguity has been identified from the face of the contract as a matter of law, in the limited sense that such evidence can assist the court in determining whether, as a matter of law, two plausible interpretations exist in the manner necessary to give rise the existence of an ambiguity.").

On February 22, 1993, the Joint Labor/Management Interpretation Committee – a body vested with the responsibility to interpret the GPPMA

– determined that "Construction Industry Promotion Funds are excluded – by Article XII, Section 2" of the GPPMA, and therefore, that "any attempt to divert industry fund payments to any other fringe benefit fund would circumvent the intent of the agreement." (Defendant's Brief, Ex. 2 A.) Approximately three years later (March 13, 1996), the General Presidents' Committee – a group that is responsible for administering the GPPMA – resolved a dispute between a local union chapter and a construction company when it concluded that management was not required to contribute to the local union's industry promotion fund. This Committee also opined that "the contractor is not required to remit additional contributions to the Apprenticeship Training Trust Fund or any other fund in lieu of Industry Fund contributions." (Defendant's Ex. 2 B.) The WGI submits that this extrinsic evidence supports its position, contending that there is no ambiguity in the contract inasmuch as the two bodies which have the responsibility for interpreting and administering the GPPMA found that there is no obligation to contribute to alternative funds in lieu of industry fund contributions.

However, the Plaintiffs urge the Court to adopt the reasoning and holding by the Court of Appeals for the Ninth Circuit in *UA Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Co.*, 396 F.3d 1056 (9th Cir. 2005). In that case, the defendant company entered into a national collective bargaining agreement with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. *Id* at 1057. The provisions within this national collective bargaining agreement stated that contributions to

various funds "shall be made in accordance with the Local Union Labor Agreement."[2] Id. However, this same national collective bargaining agreement also stated that industry promotion fund contributions were not mandatory. *Id.* The local collective bargaining agreement required those employers, who did not contribute to industry promotion funds, to pay an equal amount into the apprenticeship training fund. *Id.* at 1058. The defendant company in that case declined to pay into the industry promotion fund or to make any "like-kind" contributions to the apprenticeship training fund. The Ninth Circuit found in favor of the plaintiff, and held that the company was obligated to make additional payments to the UA Local 342 Apprenticeship & Training Trust. *Id.*

Contrary to the Plaintiffs' position on this issue, the case at hand is distinguishable from the *Babcock & Wilcox* case. Here, the unambiguous text of the GPPMA clearly states that only fringe benefits which "accrue to the direct benefit of the individual craft employees" must be paid, and specifically excludes industry promotional funds. The language within the GPPMA is very clear, and quite different from the national collective bargaining agreement in *Babcox & Wilcox*. The memoranda of understanding, which amended the local collective bargaining agreements, attempts to substitute "like-kind" contributions for industry promotion funds, resulting in additional contributions to those funds that employers, such as

---

[2] The national collective bargaining agreement at issue here states that "(w)elfare Funds, Pension Funds, Apprenticeship Training Funds and other monetary funds called for in the Local Union Labor Agreement shall be paid in accordance with the Local Union Labor Agreement." *Babcox & Wilcox*, 396 F.d3d at 1057.

the WGI, have already contributed. This, in turn, imposes an unwarranted burden upon those contractors that was neither contemplated nor incorporated by the framers of the GPPMA. Under these circumstances, the Court has no choice but to find that industry promotion fund contributions, or additional contributions to other funds in lieu of such contributions, are not required by the GPPMA.

Accordingly, and for the reasons stated above, the Court must, and does, grant the WGI's application for the entry of a summary judgment. The Plaintiffs' motion for summary judgment is denied.

IT IS SO ORDERED.

Dated: January 9, 2008
Detroit, Michigan

s/ Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
United States District Court Judge

* * *

[Certificate of Service Omitted in Printing of this Appendix]

APPENDIX C

AO 450 (Rev. 7/99) Judgment in a Civil Case
CLOSED _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case Number: 06-14288
Honorable Julian Abele Cook, Jr.

[Filed January 9, 2008]

JOINT ADMINISTRATIVE COMMITTEE OF THE PLUMBING AND PIPEFITTING INDUSTRY IN THE DETROIT AREA, PLUMBERS LOCAL NO. 98 APPRENTICESHIP FUND AND PIPEFITTERS LOCAL NO. 636 INSURANCE FUND,

Plaintiff,

v.

WASHINGTON GROUP INTERNATIONAL, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

- **Decision by Court.** The parties submitted Cross Motions for Summary Judgment on May 31, 2007. The issues have been fully briefed and a decision has been rendered.

  IT IS ORDERED AND ADJUDGED judgment is entered in favor of the Defendant Washington Group International, Inc. and against Plaintiff Joint Administrative Committee of the Plumbing and Pipefitting Industry in the Detroit Area, Plumbers Local No. 98 Apprenticeship Fund and Pipefitters Local No. 636 Insurance Fund.

Pursuant to Rule (77d), FRCivP
Copies have served upon all counsel of record by electronic means and mailed to non ECF participants.

Date: January 9, 2008

David Weaver, Clerk of Court

s/ KaMyra Alford
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-1271

[Filed August 18, 2009]

JOINT ADMINISTRATIVE COMMITTEE, ET AL.,	)
Plaintiffs-Appellants,	)
v.	)
WASHINGTON GROUP INTERNATIONAL, INC.,	)
Defendant-Appellee.	)

ORDER

BEFORE: BATCHELDER; Chief Judge; SUHRHEINRICH and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX E

R. 21, EXHIBIT D

General Presidents'
Project Maintenance
Agreement

SAMPLE

BUILDING-CONSTRUCTION TRADES DEPT.
AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS
AFL CIO
ORGD. FEB. 10, 1908

AMC
ASSOCIATED
MAINTENANCE
CONTRACTORS

The Answer to Maintenance Challenges

* * *

ARTICLE XII: WAGE RATES AND PAYDAY

* * *

2. A. Fringe benefits as negotiated in local and/or National working agreements shall be paid in addition to wage rates as specified in Schedule "A." Only bona fide fringe benefits which accrue to the direct benefit of the individual craft employee are required. This includes health & welfare funds, annuity, vacation, apprenticeship, training funds, and pension funds. Construction industry promotional funds are not applicable under terms of this Agreement. (Bulletins 2, 3, 8 & 20)

Wage differential for foremen are established by the procedure set forth in the appropriate local union construction agreement and the established differential is then added to the journeymen maintenance wage rate in the General Presidents' Project Maintenance Agreement.

* * *

APPENDIX F

R. 21, EXHIBIT E

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is made and entered into this 17th day of October, 2002, by and between the METROPOLITAN DETROIT PLUMBING & MECHANICAL CONTRACTORS ASSOCIATION, INC., the PLUMBING, HEATING & COOLING CONTRACTORS ASSOCIATION OF SOUTHEASTERN MICHIGAN, INC. (hereinafter referred to as the "Associations"), and JOURNEYMEN PLUMBERS LOCAL NO. 98 (hereinafter referred to as the "Union").

WITNESSETH:

WHEREAS, the parties desire to amend certain provisions of the Collective Bargaining Agreement concerning an employer's election to not contribute to the Plumbing and Mechanical Contractors of Detroit Industry Fund;

NOW THEREFORE IT IS AGREED:

Article VI(D)(5)(a) – Trust Funds - is hereby modified by the addition of the following sentence:

> Effective December 1, 2002, any signatory employer not contributing to the Industry Fund shall contribute a like amount to the

Metropolitan Detroit Plumbing Industry Training Trust Fund which shall be in addition to the regular training trust fund contribution required by sub-paragraph (2) of this Article.

METROPOLITAN DETROIT PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION, INC.

By: /s/_____

PLUMBERS LOCAL NO. 98 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

By: /s/_____

PLUMBING, HEATING & COOLING CONTRACTORS ASSOCIATION OF SOUTHEASTERN MICHIGAN INC.

By: /s/_____

W0252966/A57-113267

APPENDIX G

R. 21, EXHIBIT F

MEMORANDUM OF UNDERSTANDING

WHEREAS the Metropolitan Detroit Plumbing and Mechanical Contractors Association, Inc., (the "Association"), and Pipefitters, Refrigeration, and Air Conditioning Service Local Union No. 636 of Metropolitan Detroit Area, Michigan (the "Union") are parties to a collective bargaining agreement effective June 1, 2001 (the "CBA");

WHEREAS the Association and Union desire to amend the CBA;

NOW, THEREFORE, the CBA is amended as follows:

Article VI – Trust Funds, ¶ 49, is hereby revised as follows:

All signatory employers, or employers otherwise bound by this Agreement, shall pay to the Mechanical Contractors Association Industry Promotion Fund, for each hour worked, the applicable contributions specified in the wage and fringe benefit schedule. In the event an employer fails to pay the Mechanical Contractors Association Industry Promotion Fund, a like-kind contribution shall be paid to the Pipefitters Local 636 Insurance Fund which

shall be in addition to the regular Insurance Fund contribution required by Article VI, ¶ 52.

This Memorandum of Understanding is effective March 1, 2006, and expires May 31, 2006.

METROPOLITAN DETROIT PLUMBING AND MECHANICAL CONTRACTORS INC.

By: /s/_____

PIPEFITTERS, REFRIGERATION, AND AIR CONDITIONING ASSOCIATION, SERVICE LOCAL UNION NO. 636 OF METROPOLITAN DETROIT AREA, MICHIGAN

By: /s/_____

W0447838.2/PF6-115194

APPENDIX H

R. 22, EXHIBIT 3, EXHIBIT A

#2
2-10-93

PROJECT MAINTENANCE AGREEMENT
BY CONTRACT
JOINT LABOR/MANAGEMENT
INTERPRETATIONS COMMITTEE

February 22, 1993

Mr. Harry Bell
Sheet Metal Workers' International Assn.
1750 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Bell:

The General Presidents' Project Maintenance Agreement Joint Labor/Management Interpretations Committee has reviewed the issue of Industry Fund payment for Sheet Metal Workers Local Union No. 33 at the Shell Chemical plant, Belpre, Ohio; UE&C-Catalytic, contractor.

The Joint Labor/Management Interpretations Committee concluded that Construction Industry

Promotional funds are excluded by Article XII, Section 2. of the agreement. In addition, any attempt to divert industry fund payments to any other fringe benefit fund would circumvent the intent at the agreement.

Sincerely,

/s/ David O. Ellenberger	/s/ Thomas H. Owens
David O. Ellenberger	Thomas H. Owens
President	Administrator
Associated Maintenance Contractors	General Presidents' Project Maintenance Agreement

cc: General Presidents' Committee
Bruce Uffelman, UE&C-Catalytic Inc.

APPENDIX I

R. 22, EXHIBIT 3, EXHIBIT B

Building and Construction Trades Department

AMERICAN FEDERATION OF LABOR —
CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 SIXTEENTH ST., N.W., Suite 603
WASHINGTON, D.C. 20006-4189

(202) 347-1461 FAX (202) 828-0724

FAX 628-5024
FAX (510) 463-0559
(hard copy to follow)

March 18, 1996

Mr. Randal Garner
United Association
P.O. Box 37800
Washington, D.C. 20013

Mr. Kenneth N. Perry
Dillingham Construction N.A., Inc.
P.O. Box 1089
Pleasanton, CA 94566-0199

Gentlemen:

On Wednesday, March 13, 1996, the General Presidents' Committee reviewed the dispute between Dillingham Construction N.A., Inc. and UA Local #342 over whether or not certain funds contained in UA Local #342's local agreement are payable under the General Presidents' Agreement. Specifically, the General Presidents' Committee has been asked to determine the following:

1. Is the contractor required, under the terms of the General Presidents' Agreement, to pay into the UA Local #342 Contract Administration Fund?

2. If the answer to the above is no, is the contractor then required, under the terms of the General Presidents' Agreement, to pay the additional amount that would have been paid into the Contract Administration Fund into another Fund (i.e. Apprenticeship Training Trust Fund and/or Joint Labor-Management Cooperation Committee Fund)?

3. Is the contractor required, under the terms of the General Presidents' Agreement, to pay into the UA Local #342 Joint Labor-Management Cooperation Committee Fund?

The General Presidents' Committee has determined that the Contract Administration Fund is an Industry Promotion Fund and is therefore not payable under the terms of the General Presidents' Agreement. Since Industry Promotion Funds are not payable under the terms of the General Presidents' Agreement, the

contractor is not required to remit additional contributions to the Apprenticeship Training Trust Fund or any other fund in lieu of Industry Fund contributions.

The General Presidents' Committee did not have sufficient time to review the evidence submitted by the parties or hear presentations concerning whether or not the UA Local #342 Joint Labor-Management Cooperation Committee Fund is payable under the terms of the General Presidents' Agreement. The General Presidents' Committee will retain jurisdiction over the issue and will reschedule the issue to be heard at the next regular meeting of the Committee to be held at 9:00 a.m., Wednesday, April 10, 1996, at The Washington Court Hotel on Capitol Hill, 525 New Jersey Avenue, N.W., Washington, D.C. and all interested parties are invited to participate in this meeting.

Fraternally and sincerely,

/s/ Thomas H. Owens
Thomas H. Owens
Administrator

THO : rmk
cc: General Presidents' Committee